INTERIOR BOARD OF INDIAN APPEALS

Rose Stuart v. Acting Billings Area Director, Bureau of Indian Affairs

25 IBIA 282 (04/19/1994)

Judicial review of this case:

Affirmed, No. CV-94-43-GF-PGH (D. Mont. July 24, 1995)
Affirmed, *Stuart v. Bureau of Indian Affairs*, No. 95-35978 (9th Cir. Mar. 14, 1997)

Related judicial case:

Stuart v. United States, 109 F.3d 1380 (9th Cir. 1997))

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ROSE STUART
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-16-A Decided April 19, 1994

Appeal from the cancellation of a deferred land sale contract.

Affirmed as modified.

1. Indians: Contracts: Generally--Indians: Lands: Individual Trust or Restricted Lands: Alienation

   Upon default by the purchaser under a deferred sale contract for trust or restricted land, all previous payments, including interest, are forfeited to the Indian owner. 25 U.S.C. § 372 (1988); 25 CFR 152.35.

2. Bureau of Indian Affairs: Generally--Indians: Contracts: Generally

   The Bureau of Indian Affairs is bound by the terms of contracts it has approved, when the contracts are not in conflict with governing regulations.

APPEARANCES: Appellant, pro se; James A. Patten, Esq., Billings, Montana, for Wilbur and Yvonne Bigby.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Rose Stuart seeks review of a September 13, 1993, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the cancellation of a deferred land sale contract between Wilbur and Yvonne Bigby (Bigbys) as sellers and appellant as purchaser. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein.

Background

On October 11, 1979, the Bigbys, owners of approximately 6,350 acres of trust land on the Fort Belknap Reservation, entered into an agreement to sell the property to appellant for $1,500,000. 1/ The parties executed

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1/ Apparently, appellant and the Bigbys are all members of the Fort Belknap Indian Community.

a supplementary agreement on March 17, 1980. The two agreements, together with a deed for the property, were approved by the Superintendent, Fort Belknap Agency, BIA, on October 28, 1980. The agreements provided, inter alia, that: (1) appellant would make installment payments to the Superintendent, on the Bigbys account, through 1991, and would make a final payment in 1992; (2) the deed would be held by the Superintendent until payments were completed; and (3) appellant would make payments on a mortgage of the land which the Bigbys had obtained in 1977 from the Federal Land Bank of Spokane (Bank). 2/

On March 3, 1986, appellant and the Bigbys agreed to defer $40,000 of appellant's payments. Their deferral agreement stated: "This deferral will be added to the end of the contract and extend the contract two years. The balloon payment of the original contract will be at the end of this two year extension."

Appellant began to go into default in 1987. Her annual payment to the Superintendent was $10,000 short. She also failed to make at least one mortgage payment to the Bank. By late 1988, it had become apparent that appellant would not be able to meet her payment schedule, and the parties began to renegotiate the terms of their original agreement. By an amendment dated May 5, 1989, and approved by the Superintendent on November 1, 1989, the parties agreed to make certain revisions to appellant's payment schedule, including extension of the term of the contract through December 1, 2003. The Bigbys also agreed to reduce the purchase price of the property so that, as of December 1, 1988, the unpaid principal was $1,035,434.11. 3/

On December 15, 1989, the Bigbys notified appellant that she was in default on her payments to the Superintendent and the Bank. They informed appellant that, in accordance with the land sale contract, they elected to terminate the contract unless appellant cured her default within 30 days.

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2/ The mortgage was approved by the Area Director on Dec. 13, 1977. The Federal Land Bank later became the Farm Credit Bank. As used in this opinion, the term "Bank" refers to either entity.

3/ A modification of the May 5, 1989, amendment was executed by the parties on May 16, 1989, and approved by the Superintendent on Nov. 1, 1989. The modification addressed certain interest due to the Bigbys and the Bank.

4/ With respect to default, section 5 of the original agreement provided:

"In the event of a default in payment, [the Bigbys] will give [appellant] notice in writing of the delinquent payment, and [appellant] will have thirty days from such notice in which to correct the default. Should [appellant] fail to correct the default within the time allowed, the contract will terminate and [the Bigbys] may repossess the lands."

The May 5, 1989, amendment added a more elaborate default provision. It provided, in part:

"In the event that [appellant] defaults in making payment when due, or otherwise fails to comply with any other covenant, term or condition

On January 17, 1990, the Superintendent wrote to appellant, giving her 10 days to show cause why the land sale contract should not be cancelled. On February 5, 1990, when appellant failed to make the delinquent payments, the Superintendent cancelled the contract.

On February 27, 1990, appellant filed a voluntary petition in bankruptcy. On March 1, 1990, she appealed to the Area Director from the Superintendent's cancellation of the land sale contract.

On April 27, 1990, the Area Director affirmed the Superintendent's cancellation of the contract. Also on April 27, 1990, appellant filed a second petition in bankruptcy, her original petition having been dismissed on April 26, 1990.

By order of June 7, 1990, the Bankruptcy Court held that BIA's cancellation of the land sale contract was void, because the BIA administrative proceedings were subject to the automatic stay provisions of 11 U.S.C. § 362 (1988). 5/ In re Rose L. Stuart, d/b/a Stuart Farms, Case No. 90-40624-011 (Bankr. D. Mont.)

During her bankruptcy proceedings, appellant sought to assume the land sale contract under 11 U.S.C. § 365. 6/ The Bankruptcy Court denied her

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fn. 4 (continued)
on their part herein contained, [the Bigbys] may, at their election, give thirty (30) days notice in writing to [appellant] of the claimed default or defaults. The notice shall be sufficient for all purposes if it describes the default in general terms. If all of the defaults are not cured and corrected within the thirty (30) day period, then, without further notice of any kind, [the Bigbys] may, at their option, elect:

"(a) That this contract be immediately cancelled and terminated and thereupon:

"i. [The Bigbys] shall be fully reinstated with all of their right, title and interest in and to all of the real property covered by this agreement and in and to all of the improvements situated thereon, including growing crops and summer fallow and [the Bigbys] shall be entitled to immediate possession of all of said property.

"ii. Sums of money heretofore paid by [appellant] shall be retained by [the Bigbys] as reasonable rental and liquidated damages and [appellant] shall have no further claim of any nature or description arising out of said agreement."
(May 5, 1989, Amendment at section 5).

5/ All further citations to the United States Code are to the 1988 edition.

6/ 11 U.S.C. § 365 provides:

"(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

"(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

motion on January 2, 1991. However, on October 15, 1991, the District Court for the District of Montana reversed, holding that appellant's proposal met the "prompt cure" requirement of section 365(b)(1). In re Rose L. Stuart, d/b/a Stuart Farms, No. CV-91-009-GF (D. Mont.).

In implementation of the District Court's order, appellant and the Bigbys executed a stipulation on February 28, 1992. The stipulation was approved by the Bankruptcy Court on April 21, 1992. An amendment to the land sale contract, incorporating the stipulation, was approved by the Area Director on April 30, 1992.

On May 8, 1992, appellant filed an amended plan of reorganization with the Bankruptcy Court. The court confirmed the plan on May 14, 1992.

On December 1, 1992, appellant failed to make a payment of $98,888.95 due under the amended land sale contract. The Bigbys notified appellant of her default on May 4, 1993. The Bigbys also sought clarification from the Bankruptcy Court as to whether the default was a matter over which the court retained jurisdiction under appellant's plan of reorganization. On May 6, 1993, the court held that it did not have jurisdiction to adjudicate the dispute between appellant and the Bigbys and that the Bigbys "may pursue their rights and remedies against [appellant] for a breach of the executory contract in accordance with terms and conditions of said contract."

By letter of May 27, 1993, the Superintendent informed appellant that she was in default and stated: "You have 30 days to cure and correct the default. Should you fail to correct the default within the time allowed, [the Bigbys] may elect to terminate the contract and take repossession of the affected lands." The Superintendent also stated that the notice could be appealed to the Area Director. Appellant filed a notice of appeal from the notice letter. 7/

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fn. 6 (continued)

"(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

"(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

"(C) provides adequate assurance of future performance under such contract or lease." 7/ The Superintendent later recognized that the notice letter should not have included appeal language because it was not a decision. See Superintendent's July 8, 1993, letter to appellant. Appellant's appeal from the notice letter was eventually consolidated with her appeal from the Superintendent's cancellation decision.

No regulation requires that BIA give notice of default in the case of a deferred land sale contract. Cf. 25 CFR 162.14, requiring a 10-day notice in the case of a lease violation. Presumably, the Superintendent sent this notice letter out of an abundance of caution, even though the Bigbys had already sent appellant the notice required under the land sale contract.

In letters to the Superintendent dated June 1, 1993, June 14, 1993, and June 25, 1993, appellant requested that a Federal mediator be appointed to resolve the dispute, that BIA guarantee payment for chemical spraying, and that BIA pay for an outside attorney to represent her in her appeal.

On June 28, 1993, the Bigbys informed the Superintendent that they wished to terminate the land sale contract. On June 29, 1993, the Superintendent issued a decision cancelling the contract.

On June 30, 1993, the Superintendent denied appellant's request for a Federal mediator. This denial was reiterated in another decision issued on July 8, 1993, in which the Superintendent also (1) held that BIA lacked the authority to guarantee payment for spraying, apparently because such a payment would have to be made by the Agricultural Stabilization and Conservation Service (ASCS); (2) denied appellant's request that BIA pay for an outside attorney to represent her in her appeals; and (3) required appellant to post an appeal bond in the amount of $72,000.

On July 27, 1993, appellant filed a notice of appeal from the June 29, 1993, cancellation decision. On various dates between July 19, 1993, and July 26, 1993, she filed four notices of appeal and statements of reasons concerning the matters decided in the June 30, 1993, and July 8, 1993, decisions.

The Area Director consolidated appellant's several appeals and, by decision dated September 13, 1993, affirmed all the Superintendent's decisions. He stated that his decision would be effective immediately, thereby enabling the Bigbys to take possession of the property. Further, he held that appellant was liable for damages in the amount of $201,151.25, representing appellant's 1992 defaulted payment, with interest thereon, and the payment that would be due on December 1, 1993. Finally, he stated that appellant would be required to provide an appeal bond in the amount of $6,034.54.

Appellant's notice of appeal from the Area Director's decision was received by the Board on October 20, 1993. The Area Director transmitted the administrative record to the Board on October 29, 1993, at which time he advised the Board that the Bigbys would have to lease the land in order to generate the income necessary to prevent foreclosure. He requested that the Board issue an expedited decision and that it require appellant to post an appeal bond. Further, he requested that the Board clarify his authority to prepare the land for leasing and approve a lease.

In response to the Area Director's requests, the Board issued an order placing the Area Director's decision into immediate effect. 8/ The Board

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8/ 43 CFR 4.314(a) provides:

"No decision of an Administrative Law Judge or an official of the Bureau of Indian Affairs, which at the time of its rendition is subject to appeal to the Board, shall be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. § 704, unless made effective pending decision on appeal by order of the Board."

found that it was appropriate to take this step because of the danger that a large amount of trust land might be lost. The Board continued:

> In accordance with this order, the Area Director may proceed to approve the actions necessary to prepare the land for spring planting. The Area Director has full authority to manage the leasing of this land, as if his September 13, 1993, decision were final for the Department of the Interior.
>
> Appellant may proceed to Federal court at this time if she wishes. She is not required to do so, however, and may continue this appeal before the Board. Appellant is requested to inform the Board if she decides to proceed immediately to court.
>
> Because the Area Director's decision is now in effect, the Board finds that it will not be necessary to require appellant to post an appeal bond. The Board takes the Area Director's request for expedited consideration under advisement.

(Board's Nov. 2, 1993, Order Placing Area Director's Decision into Immediate Effect).

Following docketing of this appeal, briefs were filed by appellant and the Bigbys. At the conclusion of briefing on March 24, 1994, the Area Director renewed his request for expedited consideration. He stated that, although a lease of the land had been approved, the lessee had not paid the rental because of the pendency of this appeal. He also stated that the ASCS will not distribute the 1994 crop subsidy while this appeal is pending. In light of the Area Director's statements the Board granted expedited consideration.

Discussion and Conclusions

[1] With respect to the sale of trust or restricted Indian lands, 25 U.S.C. § 372 provides:

> All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of 10 percentum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid on such deferred payments, all payments made, together with all interest paid on such deferred installments, shall be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the allottee or his heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land.

25 CFR 152.35 provides:

> When the Indian owner [of trust or restricted land] and purchaser desire, a sale may be made or approved on the deferred payment plan. The terms of the sale will be incorporated in a memorandum of sale which shall constitute a contract for delivery of title upon payment in full of the amount of the agreed consideration. The deed executed by the grantor or grantors will be held by the Superintendent and will be delivered only upon full compliance with the terms of sale. If conveyance of title is to be made by fee patent, request therefor will be made only upon full compliance with the terms of the sale. The terms of the sale shall require that the purchaser pay not less than 10 percent of the purchase price in advance as required by the Act of June 25, 1910 (36 Stat. 855), as amended (25 U.S.C. 372); terms for the payment of the remaining installments plus interest shall be those acceptable to the Secretary and the Indian owner. If the purchaser on any deferred payment plan makes default in the first or subsequent payments, all payments, including interest, previously made will be forfeited to the Indian owner.

These statutory and regulatory provisions, together with the terms of the land sale agreement between appellant and the Bigbys, govern the matter at issue here. It is clear that, upon a default in appellant's payments, absent cure within the 30-day cure period, the Bigbys were entitled to terminate the agreement.

Appellant does not deny that she defaulted. However, in her notice of appeal, she indicated that she made an offer of payment to the Bigbys and that the offer was refused (Notice of Appeal at 3). In her statement of reasons, appellant stated that, on May 13, 1993, she offered to make her overdue December 1992 payment, with interest, in two installments. Appellant provided no further details concerning this offer (Statement of Reasons at 4). The Bigbys stated in their answer brief that appellant offered to pay $20,000 in May 1993 and $80,000 in the fall of 1993 (Answer Brief at 2). Appellant has not disputed the Bigbys' statement in this regard, although she had the opportunity to do so in her reply brief. The Board therefore takes the Bigbys' statement as accurate.

The Bigbys' notice of default to appellant was dated May 4, 1993. Appellant's May 13, 1993, offer was made within the 30-day cure period. Her offer did not, however, promise cure within the 30-day period. Nor was cure effected within that period. Accordingly, under the terms of the land sale contract, the Bigbys retained their right to terminate the contract. In other words, appellant's offer gave her no right to prevent termination of the contract in the event the Bigbys were unwilling to accept her offer.

Appellant contends that the Area Director improperly issued his decision before she filed a statement of reasons. Appellant filed statements of reasons with four of her notices of appeal. She did not, however, file a statement of reasons with her notice of appeal from the June 29, 1993, cancellation decision and, accordingly, was required under 25 CFR 2.10(c)

to file a statement of reasons within 30 days of the date she filed her notice of appeal. She filed her notice of appeal from the cancellation decision on July 27, 1993. Thus, she should have filed her statement of reasons by August 26, 1993. The Area Director did not issue his decision until September 13, 1993. It clearly appears that he allowed sufficient time for receipt of appellant's statement of reasons. Even if the Area Director erred in this regard, however, the Board finds that the error has been cured in these proceedings, because appellant has had ample opportunity to present her arguments before this Board. See, e.g., Jerome v. Acting Aberdeen Area Director, 23 IBIA 137, 138-39 n.1 (1992). 9/

Appellant argues at great length that BIA was unfair to her and that it breached its trust responsibility toward her. In fact, it is clear from the record that BIA was extremely accommodating to her, as were the Bigbys. It is also clear that BIA violated no trust duty toward appellant.

[2] Appellant defaulted in her payments under the land sale contract and failed to cure her default within the time allowed under the contract. The Bigbys elected to terminate the contract, as was their right. BIA is bound by the terms of contracts it has approved, unless the contract conflicts with governing regulations. See, e.g., Comanche Housing Authority v. Anadarko Area Director, 22 IBIA 271, 278 (1992), and cases cited therein. There was no conflict with a governing regulation in this case. Accordingly, BIA was obligated to respect the contractual right of the Bigbys to terminate the contract.

Appellant has not shown that the Area Director erred in cancelling the contract. Therefore, the Board affirms the Area Director's cancellation decision.

The Area Director's decision must, however, be modified in some respects. The Area Director purported to assess damages against appellant. The Board is not aware of any authority in 25 U.S.C. § 372, 25 CFR Part 152, or the land sale contract under which an Area Director nay assess damages under the circumstances present here.

The Area Director also purported to make his decision effective immediately. Under BIA and Board regulations, a BIA official may not make his/her own decision effective immediately. Only the BIA official at the next appeal level, or the Board in the case of an Area Director's decision, may do so. See 25 CFR 2.6(a); 43 CFR 4.314(a). 10/ In this case, the Area

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9/ The Area Director might be faulted for issuing his decision before the Bigbys had an opportunity to file an answer brief under 25 CFR 2.11. See Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103 (1992). However, only the Bigbys would have standing to object to this, and they have not done so.

10/ 25 CFR 2.6(a) provides:

"No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as

Director's error was cured when the Board placed his decision into immediate effect by its order of November 2, 1993.

The Area Director's attempt to require an appeal bond was also flawed. While he had authority to require a bond during the time the appeal was pending before him, 25 CFR 2.5, he lacked authority to impose a prospective bond requirement for the time appellant's appeal would, presumably, be pending before the Board. Only the Board has authority to require an appeal bond to cover this period of time. See 43 CFR 4.332(d). The Area Director appeared to recognize this in his October 29, 1993, memorandum transmitting the administrative record. In that memorandum he requested the Board to impose a bond requirement. The Board finds that the bond requirement in the Area Director's decision was made moot by the Board's November 2, 1993, order.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's September 13, 1993, decision is affirmed as modified by deletion of the provisions concerning damages, immediate effectiveness, and prospective appeal bond. 11/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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fn. 10 (continued)
to constitute Departmental action subject to judicial review under 5 U.S.C. § 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately."

43 CFR 4.314(a) is quoted in note 8, supra.

11/ All arguments made by appellant and not discussed in this decision have been considered and rejected.